

1 Mark C. Goodman (Bar No. 154692)
2 Ethan A. Miller (Bar No. 155965)
3 HOGAN LOVELLS US LLP
4 3 Embarcadero Center, Suite 1500
5 San Francisco, California 94111
6 Telephone: (415) 374-2300
7 Facsimile: (415) 374-2499
8 mark.goodman@hoganlovells.com
9 ethan.miller@hoganlovells.com

10 Attorneys for Defendant
11 BIMBO BAKERIES USA, INC.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ALEX ANG and LYNN STREIT, individually
and on behalf of all others similarly situated,

Plaintiffs,

v.

BIMBO BAKERIES USA, INC.,

Defendant.

Case No. 13 Civ. 1196 (WHO)

**REPLY IN SUPPORT OF MOTION
TO DISMISS AMENDED
COMPLAINT**

Hearing: August 28, 2013

Time: 2:00 p.m.

The Hon. William H. Orrick

TABLE OF CONTENTS

Page

I.	INTRODUCTION	1
II.	DISCUSSION	2
A.	Plaintiffs Fail To Meet Their Basic Pleading Obligations	2
1.	Plaintiffs' Claims are Subject to Rule 9(b)	2
2.	Plaintiffs Fail to Meet the Rule 9(b) Standard	3
3.	Plaintiffs Fail to Plead Reasonable Reliance	5
B.	Plaintiffs Fail To Adequately Plead Claims As To Each Product At Issue	6
1.	The AHA's Heart Check Mark is not a Paid Endorsement	6
2.	Whole Grains are not Subject to Nutrient Claim Restrictions	8
3.	Plaintiffs' "Fresh" Claim Fails	10
4.	Plaintiffs' "Excellent Source of Fiber" Claims Fail	11
5.	Toasted Bread does not Violate any Regulations	11
6.	Plaintiffs' Soy Flour Claims Fail	12
C.	Plaintiffs Do Not Have Standing As To Products They Never Purchased	13
D.	Plaintiffs' CLRA Claims Must Be Dismissed	13
E.	Plaintiffs' Claims Remain Preempted	144
F.	Plaintiffs' Unjust Enrichment Claims Should Be Dismissed	14
III.	CONCLUSION	15

TABLE OF AUTHORITIES

		Page(s)
1	CASES	
2	<i>Ackerman v. Coca-Cola Co.</i> , 2010 WL 2925955 (E.D.N.Y. July 21, 2010)	10
3	<i>Allen v. Simalson Corp.</i> , 2013 WL 2120825 (S.D. Cal. May 14, 2013)	4
4	<i>Arroyo v. Pfizer, Inc.</i> , 2013 WL 415607 (N.D. Cal. 2013)	12
5	<i>Astiana v. Ben and Jerry's Homemade, Inc.</i> , 2011 WL 2111796 (N.D. Cal. May 26, 2011)	3, 14
6	<i>Barocio v. Bank of Am.</i> , 2012 WL 3945535 (N.D. Cal. Sept.10, 2012)	14
7	<i>Brazil v. Dole Food Co., Inc.</i> , 2013 WL 1209955 (N.D. Cal. Mar. 25, 2013)	14
8	<i>Ecological Rights Foundation v. Pacific Gas and Elec. Co.</i> , 713 F.3d 502 (9 th Cir. 2013)	7
9	<i>Edmonson v. Proctor and Gamble Co.</i> , 2011 WL 1897625 (S.D. Cal. May 17, 2011)	4
10	<i>Freeman v. Time, Inc.</i> , 68 F.3d 285 (9 th Cir. 1995)	5
11	<i>In re Apple & AT & T iPad Unlimited Data Plan Litig.</i> , 802 F.Supp.2d 1070 (N.D. Cal. 2011)	13
12	<i>In re Silicon Graphics Secs. Litig.</i> , 183 F.3d 970 (9 th Cir. 1999)	7
13	<i>Ivie v. Kraft</i> , 2013 WL 685372 (N.D. Cal. Feb. 25, 2013)	13
14	<i>Janney v. General Mills</i> , 2013 WL 1962360 (N.D. Cal May 10, 2013)	2, 3, 5
15	<i>Jones v. ConAgra Foods, Inc.</i> , 912 F.Supp.2d 889 (N.D. Cal. 2012)	4
16	<i>Kearns v. Ford Motor Co.</i> , 567 F.3d 1120 (9 th Cir. 2009)	4, 5

1		
2	<i>Khasin v. Hershey Co.</i> , 2012 WL 5471153 (N.D. Cal. Nov. 9, 2012).....	3, 14
3		
4	<i>Kosta v. Del Monte Corp.</i> , 2013 WL 2147413 (N.D. Cal. May 15, 2013)	3, 14
5		
6	<i>Morrison v. TriVita, Inc.</i> , 2013 WL 1148070 (S.D. Cal. Mar. 19, 2013)	3
7		
8	<i>Pirozzi v. Apple, Inc.</i> , 2012 WL 6652453 (N.D. Cal. Dec. 20, 2012)	3
9		
10	<i>Pom Wonderful v. The Coca-Cola Co.</i> , 679 F.3d 1170 (9 th Cir. 2012).....	14
11		
12	<i>Ries v. Hornell Brewing Co.</i> , 2011 WL 1299286 (N.D. Cal. April 4, 2011)	5
13		
14	<i>Rooney v. Cumberland Packing Corp.</i> , 2012 WL 1512106 (S.D. Cal. 2012)	12
15		
16	<i>Ross v. Sioux Honey Assoc. Co-Op</i> , 2013 WL 146367 (N.D. Cal. Jan. 14, 2013)	12
17		
18	<i>Vess v. Ciba-Geigy Corp. USA</i> , 317 F.3d 1097 (9 th Cir. 2003).....	3
19		
20	<i>Williams v. Gerber Products Co.</i> , 552 F.3d 934 (9 th Cir. 2008).....	5, 6, 11
21		
22	<i>Yumul v. Smart Balance, Inc.</i> , 733 F.Supp.2d 1117 (C.D. Cal. 2010).....	4, 5, 6, 14
23		
24	STATUTES	
25		
26	21 U.S.C. § 343(g)	12
27		
28	Cal. Civil Code § 1782(a)	13

1 **RULES**

2	21 C.F.R. § 101.12	9
3	21 C.F.R. § 101.54(c).....	9
4	21 C.F.R. § 101.65	9
5	21 C.F.R. § 101.95(a).....	10
6	Rule 8	5
7	Rule 9(b).....	2, 3, 4, 5

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1 **I. INTRODUCTION**

2 In opposing BBUSA's motion to dismiss, plaintiffs duck the central issues, refusing to
 3 explain exactly what the labels at issue actually say and how those statements (1) misled plaintiffs
 4 and (2) caused them damages. Indeed, in 25 pages of opposition, plaintiffs repeat at length the
 5 allegations of the First Amended Complaint ("FAC") and their interpretation of the law set forth
 6 in that pleading, but their failure to actually identify the specific labels that they ostensibly relied
 7 on when they purchased specific products dooms the FAC. The FAC is devoid of any
 8 information that would allow BBUSA or the trier of fact to understand which specific products
 9 plaintiffs purchased and what labels and advertising they actually viewed, if they viewed any at
 10 all, and it is dispositive on this motion that every label for each product was not identical (which
 11 the Court may easily ascertain by simply reviewing the labels now before it). Quite simply, by
 12 not specifying where and when they purchased the allegedly illegal products, what exactly they
 13 purchased or what (if any) advertisements they viewed, plaintiffs fail to meet the most basic
 14 pleading requirements.

15 This failure is perhaps best highlighted by the plaintiffs themselves when they claim
 16 compliance with the "What" of the "Who, What, When, Where and How" pleading requirement
 17 by simply asserting in their opposition that "the 'What' is Defendant's . . . labeling." (Opp. at
 18 11.) This ambiguous reference, following on the heels of their failure to put any labels before the
 19 Court through the FAC, illustrates the problem here: Even now, after BBUSA has moved to
 20 dismiss the FAC because of its vagueness, plaintiffs still do not specify **what** each specific label
 21 says. Plaintiffs all but concede their failure to place BBUSA on notice of the actual labels at issue
 22 when, in their Objections to BBUSA's Request for Judicial Notice, plaintiffs assert that "it is
 23 entirely unclear if [the labels attached] accurately reflect the . . . labels at issue in this action."
 24 (Objections at 1.) This is precisely BBUSA's point: If this case involved one product and one
 25 label -- instead of 100 or more variants that plaintiffs have tried to put at issue -- this may not be a
 26 problem but, having elected to cast an incredibly wide net, due process requires plaintiffs to
 27 actually identify each of the differently labeled products that they challenge.

28 Plaintiffs' refusal to tackle BBUSA's arguments on other issues is equally telling. For

1 example, instead of explaining how the FAC satisfies the requirements of Rule 9(b), which
 2 governs their fraud allegations, plaintiffs argue that the FAC, which is replete with express fraud
 3 allegations, actually does not allege fraud. Plaintiffs make this argument despite, among other
 4 things, labeling one of their UCL claims “Fraudulent Business Acts and Practices.” (FAC at 35.)
 5 And instead of responding to the fact that the American Heart Association (“AHA”) check mark
 6 is not a paid endorsement, plaintiffs simply repeat their unsupported allegation that the heart
 7 check mark is a paid endorsement and add that they know this because, once the mark is
 8 approved, it can be renewed indefinitely by paying an annual fee. This “argument” ignores the
 9 fact that (1) a product still needs to meet the criteria set by the AHA to qualify for the mark and
 10 (2) the AHA annually re-assesses every product receiving the mark to ensure that they continue to
 11 meet those criteria. Plaintiffs then completely ignore the fact that Sara Lee label statements
 12 regarding whole grains are not nutrient claims because the regulations dictate that whole grains
 13 are ingredients, not nutrients, and are not subject to nutrient regulations. Plaintiffs instead simply
 14 re-assert their allegation that the Sara Lee labels fail to meet nutrient regulations that do not apply
 15 to them.

16 In sum, plaintiffs have failed (twice now) to meet the basic pleading requirements of the
 17 federal rules and the substantive regulations upon which they base their claims. Those failings
 18 require dismissal of the FAC.

19 **II. DISCUSSION**

20 **A. Plaintiffs Fail To Meet Their Basic Pleading Obligations**

21 **1. Plaintiffs’ Claims are Subject to Rule 9(b)**

22 In plaintiffs’ view, because the UCL permits three different types of claims (for
 23 “unlawful, unfair or fraudulent business act[s]”), simply stating that their UCL claims are for
 24 “Unlawful business acts and practice” (as opposed to unfair or fraudulent acts) exempts those
 25 claims from Rule 9(b). Plaintiffs’ argument ignores the language of their pleading and their
 26 entire theory of this case.

27 “Regardless of whether fraud is a necessary element of a claim, where a plaintiff alleges a
 28 uniform fraudulent course of conduct, and relies on that course of conduct as the basis for the

1 claims, the complaint must meet the requirements of Rule 9(b).” *Janney v. General Mills*, 2013
 2 WL 1962360, at *9 (N.D. Cal May 10, 2013) (citing *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d
 3 1097, 1103 (9th Cir. 2003). In *Janney*, the plaintiff argued that, because its UCL food mislabeling
 4 claims did not include fraud as an element, its claims were not subject to Rule 9(b). *Id.* The
 5 *Janney* court recounted how the complaint alleged that the defendant falsely represented the
 6 contents of the products through mislabeling, that the labels were “deceptive,” and that the
 7 defendant “intentionally misrepresented its products for financial gain.” *Id.* at *10. In light of
 8 these allegations, the court found “[w]hen claims under the CLRA, UCL, and FAL are based on a
 9 manufacturer’s alleged misrepresentations about a product’s characteristics, those claims sound in
 10 fraud and Rule 9(b) applies.” *Id.* (citing *Morrison v. TriVita, Inc.*, 2013 WL 1148070, at *5 (S.D.
 11 Cal. Mar. 19, 2013); *Pirozzi v. Apple, Inc.*, 2012 WL 6652453, at *6 (N.D. Cal. Dec. 20, 2012)).

12 The pleading before this Court, which repeatedly alleges that BBUSA intentionally
 13 falsified its labels to drive sales (*see, e.g.*, FAC at ¶¶ 3, 5, 17, 85, 91, 119, 130, 166, 184) and that
 14 the labels were deceptive (*see, e.g.*, FAC at ¶¶ 6, 12, 15, 54, 210), is no different than the
 15 complaint in *Janney*. Plaintiffs specifically allege that BBUSA intentionally deceived consumers
 16 to drive more profit: “Defendant is also aware that consumers desire certain attributes in the
 17 foods they purchase and thus falsely labels its products to appeal to these preferences” (FAC at
 18 ¶ 3) and “Defendants’ labeling as alleged herein is false and misleading and was designed to
 19 increase sales of the products at issue” (FAC at ¶ 166). Most telling is the fact that plaintiffs
 20 titled their third cause of action “Fraudulent Business Acts and Practices.” Finally, plaintiffs’
 21 opposition asserts that “[t]he misbranding of these substantially similar products was part of the
 22 same over-arching scheme to deceive and defraud consumers with false, misleading, and
 23 deceptive food labels.” (Opp. at 23.) Fraud allegations pervade the FAC and plaintiffs were
 24 required to plead their claims pursuant to Rule 9(b).

25 **2. Plaintiffs Fail to Meet the Rule 9(b) Standard**

26 Relying on *Kosta v. Del Monte Corp.*, 2013 WL 2147413 (N.D. Cal. May 15, 2013),
 27 *Khasin v. Hershey Co.*, 2012 WL 5471153 (N.D. Cal. Nov. 9, 2012), and *Astiana v. Ben and*
 28 *Jerry’s Homemad*e, Inc., 2011 WL 2111796 (N.D. Cal. May 26, 2011), plaintiffs assert that they

1 satisfy the “when” and “where” prongs of the Rule 9(b) test by simply asserting that the offending
 2 statements were found on “Defendant’s package labels” “since March 18, 2008 and through the
 3 defined Class Period.” (Opp. at 10-11.) In the Ninth Circuit, “[a] party alleging fraud must ‘set
 4 forth **more** than the neutral facts necessary to identify the transaction.’” *Kearns v. Ford Motor*
 5 *Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (citation omitted). Rule 9(b) is supposed “to provide
 6 defendants with adequate notice to allow them to defend the charge and deter plaintiffs from the
 7 filing of complaints ‘as a pretext for the discovery of unknown wrongs.’” *Id.* at 1125. Applying
 8 this standard, courts have held in mislabeling cases that Rule 9(b) is not met where a complaint
 9 fails to allege (1) when the plaintiff saw the misrepresentation, (2) the dates on which purchases
 10 were made, and (3) the geographic location of the purchases. *See, e.g., Allen v. Simalson Corp.*,
 11 2013 WL 2120825, at *7 (S.D. Cal. May 14, 2013); *Jones v. ConAgra Foods, Inc.*, 912 F.Supp.2d
 12 889, 902-03 (N.D. Cal. 2012); *Edmonson v. Proctor and Gamble Co.*, 2011 WL 1897625, at * 4-
 13 5 (S.D. Cal. May 17, 2011); *Yumul v. Smart Balance, Inc.*, 733 F.Supp.2d 1117, 1124 (C.D. Cal.
 14 2010).¹

15 The claims here must be dismissed for the same reasons. The FAC does not identify
 16 where or when products were purchased (or what exact products were purchased) and, therefore,
 17 cannot allege **what** actual labels are at issue. Indeed, plaintiffs admit they do not know what
 18 labels they have placed at issue. (*See* BBUSA’s Response to Objections to RJN at 1-2.) Without
 19 this information, one is left to guess as to which labels are at issue in this case and what they say.
 20 For example, the FAC alleges that plaintiffs purchased “Thomas’ Plain Bagel Thins” with labels
 21 that violate the law. (*See* FAC at ¶ 4.) However, that product comes in different quantities with
 22 different labels. These differences are highlighted by the variety of labels for “Thomas’ Plain
 23 Bagel Thins” provided in Exhibits 13 through 20 to BBUSA’s Request for Judicial Notice

24 ¹ The necessity for such specific allegations is obvious where, as here, the packaging used for the
 25 products subject to the litigation is not uniform. Under such circumstances, simply alleging that the offending
 26 statements were found on “Defendant’s package labels” “since March 18, 2008 and through the defined Class
 27 Period” does not specify which packages and statements plaintiffs claim are illegal. *Yumul* dismissed a
 28 complaint that did not specify where in California the products were purchased and failed the “when” prong by
 not alleging that the packaging did not change over a ten year period. 733 F.Supp.2d at 1124. Similarly, in
ConAgra, this Court held that the complaint did not provide notice of plaintiff’s claims because it did not
 specify when and where the products were purchased. 912 F.Supp.2d at 902-03.

1 (“RJN”), each of which includes different text (and the vast majority of which does not include
 2 the claim about which the plaintiffs complain). The Bagel Thins are but one example of the
 3 pleading deficiencies in the FAC, which does not place before the Court the content of any of the
 4 labels for the products on which plaintiffs are suing BBUSA. Because the FAC fails to identify
 5 the relevant packaging, it fails to allege “what” is at issue and, thus, fails to meet the requirements
 6 of Rule 9(b) (let alone the basic notice pleading requirements of Rule 8).

7 The extent of plaintiffs’ pleading failure is revealed in their opposition where, in response
 8 to the argument that the FAC’s allegations provide no notice of the packaging at issue, plaintiffs
 9 state “[t]o the extent Defendant argues that certain other packages of Thomas’ Bagel Thins may
 10 not have contained an ‘excellent source of fiber’ claim, this only raises questions of fact.” (Opp.
 11 at 21, n. 20). Which packages and statements are at issue in a mislabeling case is **not** an issue of
 12 fact; it is a **fundamental element of plaintiffs’ pleading burden**. *See Kearns*, 567 F.3d at 1124.
 13 To hold otherwise would permit a plaintiff to engage in what the Ninth Circuit calls a “pretext for
 14 the discovery of unknown wrongs” prohibited by Rule 9(b). *Id.* at 1125. Courts in this district
 15 have dismissed mislabeling claims where plaintiffs have made far greater attempts to comply with
 16 basic pleading requirements than have the plaintiffs here. *See Janney*, 2013 WL 1962360 at *11
 17 (attaching a “selection of labels” at issue does not satisfy Rule 9(b)); *Ries v. Hornell Brewing Co.*,
 18 2011 WL 1299286, at *4 (N.D. Cal. April 4, 2011) (dismissing claims based upon labels not
 19 submitted to the court). Here, plaintiffs attach **no** labels to their complaint, forcing BBUSA to
 20 attach representative (but by no means all) labels to a motion to dismiss to illustrate the breadth of
 21 labels conceivably -- but certainly not definitively -- at issue.

22 **3. Plaintiffs Fail to Plead Reasonable Reliance**

23 As if more were needed for dismissal of this action, plaintiffs must allege a probability of
 24 deception with respect to “consumers acting reasonably in the circumstances, not just any
 25 consumers” and they have not done so. *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995)
 26 (internal quotation and citations omitted); *see also Yumul*, 733 F.Supp.2d at 1125. Plaintiffs rely
 27 heavily on *Williams v. Gerber Products Co.*, 552 F.3d 934 (9th Cir. 2008) to justify their failure to
 28 plead that a reasonable consumer is likely to be deceived by any of the packaging at issue. (Opp.

1 at 9.) While it is true that, generally speaking, “*Williams* stands for the proposition that where
 2 product packaging contains an affirmative misrepresentation, the manufacturer cannot rely on the
 3 small-print nutritional label to contradict and cure that misrepresentation” (*Yumul*, 733 F.Supp.2d
 4 at 1129), BBUSA does not contend that plaintiffs’ claims fail simply because small print
 5 somewhere on the package reveals the truth. For example, the plausibility of plaintiffs’
 6 allegations that Entenmann’s Soft’ees labels are illegal because they include the word “fresh” on
 7 the package (see FAC at ¶¶ 83-94) is undermined not just by the list of ingredients that expressly
 8 includes preservatives but by the fact that (1) the packaging plainly says on the front, right next to
 9 the word “fresh,” that the product is “baked” (and, thus, it is a processed product and wholly
 10 different from a “fresh” fruit or vegetable) and (2) it has a highly visible “sell by” date that
 11 connotes that it is not intended to sit on a shelf for only one day. (See RJN Ex. 23.) Similarly,
 12 plaintiffs allege that packaging for Thomas’ Plain Bagel Thins wrongly asserts that the product is
 13 an excellent source of fiber but -- to the extent the statement exists on any Bagel Thins packaging
 14 at all -- the statement “excellent source of fiber” is in the same panel as and in *smaller* font than a
 15 statement that they are a “good source” of fiber, a statement about which plaintiffs do not and
 16 cannot complain. (See RJN Exs. 19-20.) This is the *opposite* circumstance than that at issue in
 17 *Williams*.

18 **B. Plaintiffs Fail To Adequately Plead Claims As To Each Product At Issue**

19 **1. The AHA’s Heart Check Mark is not a Paid Endorsement**

20 In pressing their position that the “heart check” mark on packaging is illegal, plaintiffs
 21 entirely ignore the evidence presented on the motion to dismiss and continue to assert, with no
 22 support whatsoever, their allegation that the only way to obtain the heart check mark is to “pay
 23 off” the AHA. Plaintiffs’ assertion, which not only contradicts the documents that they relied on
 24 in drafting the FAC but ascribes negative motivations to a respected health organization, is not
 25 enough to support their claim even at this early stage.

26 Plaintiffs assert that the Court may not consider all of the documents in Exhibit 28 to the
 27 RJN because they are not directly cited in the FAC and, even if BBUSA were correct that the
 28 only payment made to the AHA is an administrative fee, factual questions have been raised. Not

1 so. First, the Court is not limited to considering only documents directly cited in a complaint and
 2 may consider any matter “incorporated by reference,” which includes not only the documents
 3 cited but those that “form[] the basis of the plaintiff’s claim.” *Ecological Rights Foundation v.*
 4 *Pacific Gas and Elec. Co.*, 713 F.3d 502, 511 (9th Cir. 2013) (citations omitted); *see also In re*
 5 *Silicon Graphics Secs. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999), *superseded by statute on other*
 6 *grounds*. Here, Exhibit 28 is simply the surrounding webpages that plaintiffs would have
 7 reviewed when they selected the few AHA statements that are referenced in the FAC.
 8 Accordingly, BBUSA has merely provided the Court with the entire “document” relied on by
 9 plaintiffs in their heart check mark claims. Second, as set forth in the RJN, the Court may also
 10 take judicial notice of the contents of a reputable website such as that maintained by the AHA.

11 Third, other than trying to create this procedural smokescreen, plaintiffs completely ignore
 12 and do not address the merits. For example, plaintiffs assert that, even if it is true that BBUSA
 13 only paid a pre-assessment fee to the AHA, it is still necessary to know “how rigorous this
 14 endorsement process is, and how many products actually ‘fail’ this process.” (Opp. at 20.) But
 15 the AHA’s website, on which plaintiffs’ relied in crafting their allegations, makes clear that a fee
 16 is paid only **before** any analysis of the product is undertaken, with no guarantee of receiving
 17 approval. (RJN Ex. 28.) A payment with no guarantee cannot be a paid endorsement and,
 18 because there is no guarantee of certification in exchange for payment, plaintiffs’ asserted
 19 “factual issues” are irrelevant to their claim. Plaintiffs also ignore the crucial fact that no product
 20 can be certified by the AHA unless it meets the AHA criteria. Indeed, plaintiffs argue that,
 21 because manufacturers must pay the certification fee every year, any subsequent payment must be
 22 a paid endorsement because the certification process does not recur every year. This attempt to
 23 invent an issue ignores the AHA documentation that makes clear that ***the certification lasts only***
 24 ***one year and must be redone each year to maintain the heart check mark.*** (*Id.*)

25 Perhaps in recognition of their pleading failure, plaintiffs attempt to salvage their claims
 26 by arguing that “Defendant can point to no FDA regulation or guidance that distinguishes
 27 certification fees from paid endorsements.” (Opp. at 20.) BBUSA has no such burden. The FAC
 28 alleges that BBUSA illegally failed to disclose a paid endorsement. (See, e.g., FAC at ¶¶ 4, 58,

1 59, 61, 63, 65, 67, 212, 213, 214, 217, 219.) There are no allegations that plaintiffs were misled
 2 due to the non-disclosure of a certification fee that did not guarantee receipt of the heart check
 3 mark and plaintiffs' opposition is not an occasion to further amend the FAC.

4 **2. Whole Grains are not Subject to Nutrient Claim Restrictions**

5 Entirely ignoring the fact that BBUSA moved to dismiss their "nutrient claims" because
 6 they expressly do not pertain to nutrients, plaintiffs simply re-allege that Sara Lee label
 7 statements regarding whole grains are illegal nutrient claims. Plaintiffs' argument boils down to
 8 an assertion that although whole grains are not nutrients they should be regulated as nutrients, an
 9 argument that is not supported by either their own allegations or the statutory scheme on which
 10 plaintiffs rely. In their opposition, plaintiffs cite "FDA 'plain English' guidance" and "implied
 11 nutrient" regulations. (Opp. at 15-16.) In their zeal to salvage these claims, plaintiffs apparently
 12 failed to read the material they cited because the "FDA 'plain English' guidance" expressly
 13 applies only to nutrients: "Therefore, *nutrients* that do not have an established DV ... may not
 14 make 'high' or 'good source' claims." (Opp. at 15 (emphasis added).) Plaintiffs cannot seek
 15 relief on a purported technical violation while at the same time deflecting attention away from the
 16 plain and obvious meaning of the legal standard cited in the FAC. As explained in the motion to
 17 dismiss, whole grains are ingredients, not nutrients, and are, therefore, not subject to nutrient
 18 regulation.

19 Conceding that whole grains are not nutrients, plaintiffs try to re-characterize their claims
 20 as implied nutrient claims by reciting the definition of an implied nutrient claim as one that
 21 "[d]escribes the food or an ingredient therein in a manner that suggests that a *nutrient* is absent or
 22 present in a certain amount." (Opp. at 16 (emphasis added).) While FDA has recognized that
 23 certain ingredient claims *may* also be nutrient content claims if they implicitly characterize a
 24 nutrient level (which plaintiffs do not even allege in their pleadings), no such characterization or
 25 association has been accredited to whole grains and plaintiffs do not plead any facts that would
 26 support such a conclusion.

27 In determining whether claims about ingredients are implied nutrient content claims, FDA
 28 does not consider the statements in isolation but analyzes them in the context of the entire label.

1 *See Food Labeling: Nutrient Content Claims*, 58 Fed. Reg. 2302, 2372 (RJN Ex. 30.) When
 2 examined in the context in which they appear on the labels ostensibly before the Court, the three
 3 challenged ingredient claims would be appropriate under the regulatory framework even if
 4 plaintiffs **had** alleged that they are implied nutrient claims (which they did not) and even if there
 5 were some legal basis on which to make such allegations (and there is not):

6 • **Classic 100% Whole Wheat:** This product includes the statement “good source of whole
 7 grain,” which appears in a banner below the product name. (RJN Exs. 5-8.) If this could
 8 constitute an implied nutrient content claim about fiber, it would comply with 21 C.F.R. § 101.65
 9 if the product contains “10 to 19 percent of the RDI... per reference amount customarily
 10 consumed.” 21 C.F.R. § 101.54(c). The Nutrition Facts panel shows that 28 grams of bread
 11 contains 8% of the RDI for dietary fiber. (RJN Exs. 5-8.) The “reference amount customarily
 12 consumed,” which is the standard set forth in the nutrient content regulation, is 50 grams for
 13 bread products. 21 C.F.R. § 101.12. Because 8% of the fiber RDI for each 28 grams converts to
 14 15% of the fiber RDI per 50 gram reference amount, the fiber level is within the 10%-19% range
 15 imposed by the nutrient content regulation to be called “good source.” Thus, the challenged
 16 ingredient statement, even if it were deemed to be an implied nutrient content claim, would be
 17 appropriate.

18 • **Soft & Smooth Whole Grain White:** The “good source of whole grain” statement on
 19 this label is part of a three-part banner, flanked by the claims “good source of fiber” and
 20 “excellent source of calcium.” (RJN Exs. 9-12.) Because the label expressly says that the
 21 product is a “good source” of fiber, it would be nonsensical to argue that the claim “good source
 22 of whole grain” also implies that the product is a “good source of fiber.” Therefore, the
 23 challenged claim reasonably can be only read as an ingredient claim to which the regulations do
 24 not apply.²

25
 26

 27 ² Even if the claim were deemed an implied nutrient content claim about fiber, it would be appropriate
 28 because the Nutrition Facts panel shows that the product contains 13% of the fiber RDI per two slices, which
 29 weigh 57 grams. (RJN Exs. 9-12.) Given the 50 grams reference amount, the product contains 11.5% of the
 30 fiber RDI, within the “good source” range.

1 • **100% Whole Wheat:** The alleged “excellent source of whole grain” statement on this
 2 product also appears in a three-part banner, flanked by “good source of fiber” and “excellent
 3 source of calcium.” (Exs. A-D.) Accordingly, it would be illogical to conclude that the
 4 “excellent source of whole grain” claim is an implied nutrient claim implying an “excellent
 5 source of fiber” when that statement would be inconsistent with the express claim on the label
 6 that it is a “good source of fiber.” Thus, this claim can be understood only as an ingredient claim.

7 Plaintiffs’ allegations fail because they cannot turn whole grains into nutrients when they
 8 are clearly ingredients under the law. Plaintiffs’ only attempt to address this failure is a citation
 9 to FDA draft guidance. (Opp. at 15, n.13.) Of course, *draft guidance* is not regulation.
 10 Nonetheless, plaintiffs cite a footnote from *Ackerman v. Coca-Cola Co.*, 2010 WL 2925955, at *3
 11 n. 7 (E.D.N.Y. July 21, 2010) to assert that, “on a motion to dismiss, the FDA’s pronouncements
 12 may still be relevant to the viability of claims.” *Ackerman* supports no such assertion.³

13 **3. Plaintiffs’ “Fresh” Claim Fails**

14 Instead of addressing the regulations BBUSA cites, plaintiffs assert that: (1) the word
 15 “fresh” is not modified on the label; (2) a reasonable consumer might be misled notwithstanding
 16 the regulations; (3) if the term “fresh” were combined with “baked” and “daily” it would raise
 17 questions of fact; and (4) FDA would have authority to “take action on a case-by-case basis”
 18 against false or misleading labeling.⁴ None of these arguments negates the reality that the
 19 regulation on which plaintiffs rely, 21 C.F.R. § 101.95(a), applies only when the term “fresh” is
 20 “used on the label or in labeling of a food in a manner that suggests or implies that the food is
 21 unprocessed.” Nor can there be any controversy as to whether a reasonable consumer would

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³ In the footnote plaintiffs cite, *Ackerman* discussed whether the Vitaminwater at issue was food or a
 23 dietary supplement. The relevance of the discussion is disclaimed by the court since “neither party asserts that
 24 this distinction is significant to the present suit.” (2010 WL 2925955, at *3 n.7.) Moreover, the court based its
 25 determination on an FDA final rule, not draft guidance. The draft guidance cited by the court was merely
 additional support for the proposition contained in the cited final rule, as evidenced by its placement after a “see
 also” signal. Draft guidance is just what its name says it is and cannot save plaintiffs’ whole grain claims.

26 ⁴ It is frankly shocking that plaintiffs would now pretend that they read the Entenmann’s label to state
 27 only that the product was “fresh” and not “baked fresh daily.” In their original complaint, drafted before
 BBUSA ever raised this issue, plaintiffs alleged that they read the same label as saying only that the product
 was “baked fresh daily.” (Original Complaint at ¶¶ 58-62.) Plaintiffs cannot plausibly claim now that they had
 a different understanding and they do not really allege that they do. (See FAC at ¶¶ 4, 93-94, 205-06.)

1 consider the Entenmann's product to be processed. The entire presentation of the product,
 2 including a prominent "sell by" date and sealed packaging, makes clear that this is a processed
 3 product, not necessarily produced and delivered the same day that it is sold.

4 **4. Plaintiffs' "Excellent Source of Fiber" Claims Fail**

5 Plaintiffs' claims related to the "Excellent Source" statement on one of the Thomas' Plain
 6 Bagel Thins packages (which might be the basis of plaintiffs' claims but one cannot be certain
 7 due to plaintiffs' pleading failure discussed above) fail to pass the reasonable consumer test
 8 because the "Excellent Source" statement is adjacent to and in a smaller font size than a "Good
 9 Source" statement on the same package. (RJN Exs. 19-20.) Thus, contrary to plaintiffs'
 10 assertion, BBUSA is not arguing against liability on the basis of a mere typographical error.
 11 Here, the statement that plaintiffs challenge was not misleading on its face and the corrective
 12 statement was certainly not in small print on the opposite side of the package. Instead, the
 13 statements were in close proximity to one another and the statement that plaintiffs claim is correct
 14 was in *larger* font size. This factual situation is distinguishable from the one at issue in *Williams*
 15 *v. Gerber Products Co.*, 552 F.3d 934 on which plaintiffs rely.

16 **5. Toasted Bread does not Violate any Regulations**

17 Plaintiffs fail to explain how "Toasted Bread" is subject to the regulations of which
 18 plaintiffs argue the product runs afoul. As previously explained, FDA Compliance Policy Guide
 19 ("CPG") § 505.350 (RJN Ex. 29) provides that a product falls outside the "bread" standard of
 20 identity for purposes of FDA regulation when its name combines the word "bread" with another
 21 descriptive term that references characteristics of the product that distinguish it from "bread."
 22 While plaintiffs attack the notion that Toasted Bread is not "bread" as "extraordinary," the fact is
 23 that statement is correct as a matter of law. Plaintiffs' only subjective attempt to address this
 24 argument is relegated to a footnote (*see* Opp. at 14, n.10) and relies on misreading § 505.350:
 25 Plaintiffs assert that the CPG only applies to "honey bread." This is just not true. The language
 26 of § 505.350 states that any products that are not "standardized bread" are not subject to the
 27 "bread" regulations on which plaintiffs rely. The "Toasted Bread" at issue here is clearly not
 28 "standardized bread," as is obvious from even a cursory review of its packaging. (RJN Exs. 21-

1 22.) Moreover, because the packaging permits a consumer to view the actual product, through a
 2 clear panel on the front of the package (and a consumer need only touch the packaged product to
 3 feel its hard texture), the fact this is not “standardized bread” is readily obvious to any reasonable
 4 consumer. While plaintiffs try to expand the “bread” standard to any food that includes the word
 5 “bread” or includes water, flour and yeast, Congress established a far more commonsense and
 6 narrow approach: A food will only be misbranded if it is represented as ***standardized*** food that
 7 conforms to the standard and “its label bears the name of the food specified by the definition and
 8 standard.” (21 U.S.C. § 343(g).) The regulation of traditional “bread” and like products, dating
 9 back to 1938, was intended to protect consumer expectations that “bread” is “bread” as defined
 10 by FDA. Plaintiffs do not allege, nor could they, that federal food standards fix in stone that any
 11 “bread-like” product cannot respond to ever-changing consumer tastes and preferences simply
 12 because the word “bread” is part of a product name or that water, flour and yeast are found in a
 13 non-standardized bread product. The fact is, Toasted Bread is not among the FDA bakery
 14 standards and is not represented as such. Thus, like the honey bread that the CPG refers to as an
 15 example, Toasted Bread is not “bread” subject to the regulations that apply to that standard of
 16 identity.

17 **6. Plaintiffs’ Soy Flour Claims Fail**

18 Plaintiffs wholly fail to take on the fact that their soy claims are based on disclosures on
 19 the allegedly mislabeled packages and, thus, must fail as a matter of law. Plaintiffs’ attempt in
 20 footnote 17 of the opposition to distinguish cases cited by BBUSA is unavailing. *Ross v. Sioux*
 21 *Honey Assoc. Co-Op*, 2013 WL 146367 (N.D. Cal. Jan. 14, 2013) is instructive here because of
 22 the Court’s analysis that a reasonable consumer would not have been deceived. For the same
 23 reason, plaintiffs’ assertion is simply wrong that *Rooney v. Cumberland Packing Corp.*, 2012 WL
 24 1512106 (S.D. Cal. 2012) and *Arroyo v. Pfizer, Inc.*, 2013 WL 415607 (N.D. Cal. 2013) are
 25 irrelevant because there was no allegation of an FDCA or Sherman law violation. Plaintiffs have
 26 a burden of pleading that a reasonable consumer would be misled by labels and these cases speak
 27 directly to that point. Moreover, plaintiffs have entirely failed to allege that a material amount of
 28 soy flour is present in the products they identify.

1 **C. Plaintiffs Do Not Have Standing As To Products They Never Purchased**

2 Where, as in the cases cited by plaintiffs, courts permit claims for non-purchased products
 3 to survive a motion to dismiss, they require that “where the named plaintiff did not purchase the
 4 product, the claims related to the not purchased products must be *nearly identical* to the claims
 5 for the purchased product.” *Id.* (emphasis added.) Thus, such claims are permitted only where
 6 the label in the non-purchased product is the same as the label on the purchased product. *Id.*
 7 (citing *Ivie v. Kraft*, 2013 WL 685372, at *3-5 (N.D. Cal. Feb. 25, 2013)).

8 As discussed above, plaintiffs’ allegations regarding the products they purchased fail to
 9 meet basic pleading standards because they do not identify with any specificity the products
 10 purchased or labels relied on. The differences in the labels on products that plaintiffs potentially
 11 purchased are significant. As exemplified by RJN Exhibits 1-23, the FAC’s minimal allegations
 12 about the products that they supposedly bought implicate a variety of packaging that varies in
 13 both appearance and content. As a result, it is impossible for this Court to determine whether the
 14 non-purchased products that plaintiffs allege violate the law are in any way similar (much less
 15 identical) to the purchased products. By failing to adequately identify the purchased products and
 16 their labels (much less the non-purchased products and labels for comparison), plaintiffs provide
 17 no baseline upon which the necessary analysis of identity could be completed to determine
 18 whether the claims related to non-purchased products may be maintained. Unless and until
 19 plaintiffs can show that the products and their labels are the same, no such claims can be alleged.

20 **D. Plaintiffs’ CLRA Claims Must Be Dismissed**

21 Plaintiffs assert that they satisfied CLRA notice requirements by a letter that incorporates
 22 their original complaint by reference. Not so. First, reference to a complaint that is no longer
 23 operative and was revised after its flaws were pointed out by BBUSA’s counsel cannot possibly
 24 constitute proper notice of plaintiffs’ claims. Second, plaintiffs did not send their Notice and
 25 Demand letter until almost a month after the original complaint was served.

26 The CLRA requires plaintiffs to provide notice of alleged violations before filing suit to
 27 allow a manufacturer to avoid litigation by remedying the purported wrongs raised by plaintiffs’
 28 letter. *See* Cal. Civil Code § 1782(a); *In re Apple & AT & T iPad Unlimited Data Plan Litig.*, 802

1 F.Supp.2d 1070, 1077 (N.D. Cal. 2011). Thus, the touchstones of the CLRA notice requirement
 2 are: (1) notice and (2) time to remedy any error prior to litigation. Plaintiffs' attempt to provide
 3 notice of now-superseded claims after filing suit plainly fails to meet these requirements and
 4 underlying rationale. Given the many opportunities plaintiffs had to provide proper CLRA
 5 notice, they should not now be permitted leave to re-notice and re-plead.

6 **E. Plaintiffs' Claims Remain Preempted**

7 Plaintiffs do not dispute, as they cannot, that federal law "comprehensively regulates food
 8 and beverage labeling" (*Pom Wonderful v. The Coca-Cola Co.*, 679 F.3d 1170, 1175 (9th Cir.
 9 2012)) and that where a challenged product "meets the conditions imposed by the FDCA and
 10 accompanying regulations, plaintiff's claims are expressly preempted by the FDCA and NLEA"
 11 (*Yumul*, 2011 WL 1045555, at *9). Therefore plaintiffs' only viable objection to preemption does
 12 not apply here because they have not alleged claims that violate the FDCA. Because the FAC
 13 fails to meet basic pleading standards or to allege any violations of the FDCA, plaintiffs' claims
 14 should be dismissed on preemption grounds.

15 **F. Plaintiffs' Unjust Enrichment Claims Should Be Dismissed**

16 Plaintiffs try to re-cast BBUSA's argument regarding their unjust enrichment claim but
 17 BBUSA simply has not asserted that California courts do not allow claims for unjust enrichment.
 18 To the contrary, BBUSA's point is that such claims are not permitted where they are duplicative
 19 of the other tort claims plaintiffs assert. Thus, in *Lanovaz*, 2013 WL 675929, at *7, this Court
 20 dismissed unjust enrichment claims as "superfluous" where plaintiff's "claim for unjust
 21 enrichment is based on the same allegations as the UCL, FAL, and CLRA claims." *See also*
 22 *Brazil v. Dole Food Co., Inc.*, 2013 WL 1209955, at *18 (N.D. Cal. Mar. 25, 2013); *Barocio v.*
 23 *Bank of Am.*, 2012 WL 3945535, at *4 (N.D. Cal., Sept. 10, 2012). *Del Monte*, 2013 WL 2147413,
 24 at *14 and *Hershey*, 2012 WL 5471153, at *9, are inapposite, as the defendants sought dismissal
 25 on the basis that unjust enrichment claims are not recognized in California, not that they are
 26 duplicative. Moreover, in *Astiana*, 2011 WL 2111796, at *11, the Court preserved plaintiff's
 27 unjust enrichment claim only because the operative complaint made clear it was pleaded in the
 28 alternative, and would therefore only be at issue if plaintiffs' substantive tort claims did not

1 survive. However, here the FAC does not identify the unjust enrichment claim as pleaded in the
2 alternative but is duplicative of plaintiff's other claims and must be dismissed.

3 **III. CONCLUSION**

4 Despite three opportunities to do so, plaintiffs still fail to provide adequate notice of their
5 allegations against BBUSA. BBUSA is left to guess as to what actual products and associated
6 labels are being attacked here. Instead of pleading the actual product labels ostensibly at issue,
7 plaintiffs chose to add pages of even less specific allegations about scores of additional products.
8 The role of the Court is not to speculate and a defendant should not be made to guess at what
9 claims it must defend. Simply asserting that the regulations raise "issues of fact" -- as if this were
10 a summary judgment motion -- does not change plaintiffs' failure to properly plead causes of
11 action on which relief can be granted. For all of these reasons, the FAC should be dismissed with
12 prejudice

13 Dated: August 2, 2013

HOGAN LOVELLS US LLP

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By: /s/ Mark C. Goodman

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Mark C. Goodman
Attorneys for Defendant
Bimbo Bakeries USA, Inc.

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